

NO. 7:05-CR-65-FL-1  
NO. 7:12-CV-271-FL

Respondent.

$$\begin{array}{c} ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \end{array}$$

## ORDER

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE # 41). On November 20, 2012, the government filed a response in support of the motion, waiving its statute of limitations defense, and stating that it does not oppose vacating petitioner's conviction and sentence as to count two. (DE # 49).

Petitioner now argues, and the government agrees, that in light of United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), petitioner does not have a predicate felony offense to support his count two conviction of felon in possession of a firearm. Petitioner therefore requests that the court vacate his conviction and sentence in count two in light of Simmons.

Where the government waives defenses to vacating the conviction on count two, and where the court upon review of the record finds that, in light of Simmons, petitioner does not have a predicate felony to support the crime of conviction in count two, the court **ALLOWS** petitioner's § 2255 motion to vacate, as follows. The court **VACATES** petitioner's judgment of conviction in count two for felon in possession of a firearm and **VACATES** his sentence as to count two. All other terms and conditions of petitioner's sentence as to count one remain the same.

SO ORDERED, this the 14th day of February, 2013.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is fluid and cursive, with the first name "Louise" being the most prominent part.

---

LOUISE W. FLANAGAN  
United States District Judge